

AMENDED IN ASSEMBLY JUNE 19, 2003

AMENDED IN SENATE MAY 7, 2003

SENATE BILL

No. 640

Introduced by Senator Burton

February 21, 2003

An act to add Article 11 (commencing with Section 10286) to Chapter 1 of Part 2 of Division 2 of the Public Contract Code, relating to state contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 640, as amended, Burton. Public contracts: expatriate corporations.

The State Contract Act governs contracting between state agencies and private contractors, and sets forth requirements for the procurement of materials, supplies, equipment, and services by state agencies. Existing law sets out the various responsibilities of the Department of General Services, and other state agencies in overseeing and implementing state contracting procedures and policies.

This bill would prohibit a state agency from entering into any ~~agreement or contract with a publicly held~~ *an* expatriate corporation, as defined, or its subsidiary. ~~This bill would allow a state department or a state agency to contract with a publicly held expatriate corporation only if, unless~~ certain conditions are met. This bill would also establish a state-mandated local program by establishing a new misdemeanor.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
2 following:

3 (a) A number of publicly traded United States based companies
4 are avoiding United States taxation and have diminished their
5 shareholders' rights by reincorporating, in name only, in tax haven
6 countries, including Bermuda and the Cayman Islands.

7 (b) An expatriate company is a United States based company
8 that has moved in name and on paper only to a tax haven country
9 and has no substantial business activities in the country of
10 reincorporation.

11 (c) This practice, also known as "corporate expatriation," is
12 part of a larger pattern of deceptive corporate practices that
13 continues to undermine the faith and confidence of investors in the
14 integrity of the financial markets.

15 (d) The state's investments and pension funds depend on
16 investor faith and confidence in the transparency, fairness, and
17 integrity of the markets.

18 (e) It is, therefore, in the best interests of the state to restore
19 faith in corporate practices and in the nation's financial system. A
20 vital and valid public purpose is served by prohibiting the state
21 from doing business with publicly held expatriate companies.

22 (f) Accordingly, it is the intent of the Legislature that, absent a
23 compelling public interest, the state not enter into any agreement
24 or contract with any publicly held expatriate corporation.

25 SEC. 2. Article 11 (commencing with Section 10286) is
26 added to Chapter 1 of Part 2 of Division 2 of the Public Contract
27 Code, to read:

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29 Article 11. California Taxpayer and Shareholder Protection
30 Act of 2003

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32 10286. This article shall be known and may be cited as the
33 California Taxpayer and Shareholder Protection Act of 2003.



~~10286.1. (a) The state may not enter into any contract with a publicly traded foreign incorporated entity or its subsidiary if all~~

10286.1. (a) Except as otherwise provided in subdivisions (b) and (c), the state may not enter into any contract with an expatriate corporation or its subsidiaries.

(b) (1) For purposes of this article, an “expatriate corporation” means a foreign incorporated entity that is publicly traded in the United States to which all of the following apply:

~~(1)–~~

(A) The United States is the principal market for the public trading of the foreign incorporated entity.

~~(2)–~~

(B) The foreign incorporated entity has no substantial business activities in the place of incorporation as compared to the business activity of its subsidiary or subsidiaries.

~~(3) The foreign entity was established in connection with a transaction or series of related transactions pursuant to which (A) the foreign entity acquired substantially all of the properties held by a domestic corporation or partnership, and (B) immediately after the acquisition more than 50 percent of the publicly traded stock, by vote or value, of the entity is held by former shareholders of the domestic corporation or by former partners of the domestic partnership or related foreign partnership. For purposes of (B), any stock sold in a public offering related to the transaction or a series of transactions is disregarded.~~

(C) Either clause (i) or clause (ii) applies:

(i) The foreign entity was established in connection with a transaction or series of related transactions pursuant to which (I) the foreign entity directly or indirectly acquired substantially all of the properties held by a domestic corporation or all of the properties constituting a trade or business of a domestic partnership or related foreign partnership, and (II) immediately after the acquisition, more than 50 percent of the publicly traded stock, by vote or value, of the foreign entity is held by former shareholders of the domestic corporation or by former partners of the domestic partnership or related foreign partnership. For purposes of subclause (II), any stock sold in a public offering related to the transaction or a series of transactions is disregarded.

(ii) The foreign entity was established in connection with a transaction or series of related transactions pursuant to which (I)

1 *the foreign entity directly or indirectly acquired substantially all*
2 *of the properties held by a domestic corporation or all of the*
3 *properties constituting a trade or business of a domestic*
4 *partnership or related foreign partnership, and (II) the acquiring*
5 *foreign entity is more than 50 percent owned, by vote or value, by*
6 *domestic shareholders or partners.*

7 *(iii) For purposes of this subparagraph, indirect acquisition of*
8 *property includes the acquisition of a stock share, or any portion*
9 *thereof, of the owner of that property.*

10 *(2) Notwithstanding subdivision (a), the state may contract*
11 *with an expatriate corporation, or its subsidiary, if it was an*
12 *expatriate corporation before January 1, 2004, to which both of*
13 *the following apply:*

14 *(A) The foreign entity provides, by operation of law, by*
15 *provisions of its governing documents, by resolution of its board*
16 *of directors, or in any other manner, at least the following*
17 *shareholders' rights:*

18 *(i) Shareholders of the entity have the right to inspect, at a*
19 *principal place of business in the United States, copies of the*
20 *entity's books and records, including, but not limited to,*
21 *shareholder names, addresses, and shareholdings in accordance*
22 *with the corporation law, as amended from time to time and as that*
23 *law is interpreted by the courts, of the United States jurisdiction*
24 *in which the entity was previously incorporated, or, if the entity was*
25 *not previously incorporated, in accordance with the terms set forth*
26 *in the Model Business Corporation Act, as that act may be*
27 *amended from time to time, provided that, if the corporate law of*
28 *the United States jurisdiction in which the entity was previously*
29 *incorporated or the Model Business Corporation Act does not*
30 *provide access to the shareholder names, addresses, and*
31 *shareholdings, these books and records are available for*
32 *inspection by shareholders for purposes properly related to their*
33 *status as shareholders of the entity.*

34 *(ii) The entity permits its shareholders to bring derivative*
35 *proceedings on behalf of the entity, provided that these derivative*
36 *proceedings are brought on a basis and under the terms applicable*
37 *under the law, as amended from time to time and as interpreted by,*
38 *or required by, the courts of the United States jurisdiction in which*
39 *the entity was previously incorporated, or, if the entity was not*
40 *previously incorporated, on a basis and under the terms set forth*



1 *in the Model Business Corporations Act as that act may be*
2 *amended from time to time and as it is interpreted by, or required*
3 *by, the courts.*

4 *(iii) Entity transactions in which any director is interested are*
5 *approved in accordance with the applicable law, as amended from*
6 *time to time and as interpreted by the courts, of the United States*
7 *jurisdiction in which the entity was previously incorporated, or, if*
8 *the entity was not previously incorporated, in accordance with the*
9 *terms set forth in the Model Business Corporations Act, as may be*
10 *amended from time to time and as interpreted by the courts*

11 *(iv) The entity has consented to the jurisdiction, for any*
12 *otherwise available cause of action by or on behalf of the entity's*
13 *shareholders, including any pendent state causes of action, of all*
14 *of the following courts:*

15 *(I) The state courts of one or more states.*

16 *(II) The United States federal courts in any state in which the*
17 *entity consents to the jurisdiction of that state's courts pursuant to*
18 *subclause (I).*

19 *(v) The entity has appointed an agent for service of process in*
20 *the state or states in which the entity has consented to jurisdiction,*
21 *as described in clause (iv), and the entity meets at least one of the*
22 *following conditions:*

23 *(I) The entity has unencumbered assets in the United States,*
24 *which assets may include equity or debt investments in United*
25 *States companies, with a book value in excess of fifty million*
26 *dollars (\$50,000,000), and the entity delivers to the Commissioner*
27 *of the Department of Corporations an opinion of an attorney*
28 *licensed in the United States that judgments rendered against the*
29 *entity may be satisfied by using these assets.*

30 *(II) The entity posts a bond or similar security in amount of at*
31 *least fifty million dollars (\$50,000,000).*

32 *(III) The entity has directors' and officers' insurance in an*
33 *amount of at least fifty million dollars (\$50,000,000).*

34 *(vi) The entity agrees that, in connection with any lawsuit*
35 *brought against it by its shareholders in any court in which the*
36 *entity has consented to jurisdiction as described in clause (iv), the*
37 *entity will provide to the court notice of the manner in which the*
38 *entity complied with clause (v) and, if the entity complied with that*
39 *clause in the manner specified in subclause (I) of clause (v), a copy*
40 *of the opinion described in that subclause.*

(vii) Shareholder approval is required for any sale of all or substantially all of the entity's assets in accordance with the law, as amended from time to time and as it is interpreted by the courts, of the United States jurisdiction in which it was previously incorporated, or, if it was not previously incorporated, in accordance with the terms set forth in the Model Business Corporations Act, as it may be amended from time to time.

(viii) The directors and officers of the entity occupy a fiduciary relationship with the entity and its shareholders and these directors and officers, in performing their duties, act in good faith in a manner that a director or officer believes to be in the best interests of the entity and its shareholders, as that standard of care is interpreted by the courts.

(ix) The entity agrees to hold no more than one of every four annual shareholder meetings in a location outside the United States and, in the event that the entity holds an annual meeting outside the United States, the entity agrees to provide access to that meeting through a Web cast or other technology that allows the entity's shareholders to do both of the following:

(I) Listen to the meeting, watch the meeting, or both.

(II) Send questions that will be addressed at the meeting.

(x) The entity provides a description of the shareholder rights described in clauses (i) to (ix), inclusive, and any subsequent changes to these rights, on the entity's Web site or in its 10K filings with the United States Securities and Exchange Commission.

(B) The entity uses worldwide combined reporting to calculate the income on which it pays taxes to the state.

~~(b)~~

(c) The chief executive officer of a state department or agency or his or her designee may waive the prohibition specified in subdivision (a) if either of the following apply:

~~(1) The state department or agency has made a written finding~~
subdivision (a) if the executive officer or his or her designee has made a written finding that the contract is necessary to meet a compelling public interest. For purposes of this paragraph section, a "compelling public interest" includes, but is not limited to, ensuring the provision of essential services, ensuring the public health and safety, or an emergency as defined in Section 1102.

~~(2) The vendor certifies to the state department or agency that it is not ineligible under subdivision (a) because the vendor, or its~~

parent business entity if it is a subsidiary, has reincorporated or reorganized in a jurisdiction within the United States subsequent to the incorporation in a foreign place of incorporation.

(c) ~~Each vendor submitting a bid or contract to a state department or agency shall also submit a declaration certifying that it is not prohibited from contracting with the state pursuant to subdivision (a). A vendor who declares as true any material matter pursuant to this subdivision or subdivision (b) that he or she knows to be false is guilty of a misdemeanor.~~

(d) ~~This section does not apply to any contract between the state and a vendor that is in effect on December 31, 2003, but an existing contract that is renewed on or after January 1, 2004, is subject to this section.~~

(d) (1) (A) *From January 1, 2004, to December 31, 2004, inclusive, each vendor seeking to submit a bid to a state department or agency shall submit to the state department or agency with which it seeks to submit a bid a declaration that the vendor is not ineligible to contract with the state pursuant to this section.*

(B) *On or before January 1, 2005, and on or before January 1 of each subsequent year, each vendor seeking to submit a bid to a state department or agency shall submit a declaration to the Department of General Services that the vendor is not ineligible to contract with the state pursuant to this section.*

(2) *A vendor that declares as true any material matter in a declaration described in this subdivision is guilty of a misdemeanor.*

(e) (1) *Except as provided in paragraph (2), this section applies to contracts that are entered into on or after January 1, 2004.*

(2) *With respect to an entity that was an expatriate corporation, as defined in paragraph (1) of subdivision (b), before January 1, 2004, this section applies to contracts that are entered into on or after April 1, 2004.*

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of

- 1 the Government Code, or changes the definition of a crime within
- 2 the meaning of Section 6 of Article XIII B of the California
- 3 Constitution.

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